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No. 02-891

IN THE

Supreme Court of the United States

CENTRAL LABORERS' PENSION FUND,
Petitioner,

v.

THOMAS E. HEINZ AND RICHARD J. SCHMITT, JR.,
Respondents.

On Writ of Certiorari
to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR THE PETITIONER

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QUESTION PRESENTED

ERISA Section 203(a)(3)(B) authorizes a pension plan to adopt a provision under which the "payment of benefits" shall be "suspended" during the period that a retiree returns to the workforce in certain capacities. 29 U.S.C. 1053(a)(3)(B). The statute does not limit this authorized suspension to only those benefits accrued (*i.e.*, earned by the participant) subsequent to the provision's adoption. ERISA Section 204(g), the "anti-cutback" rule, separately prohibits plan amendments that "decrease" previously accrued pension "benefits." 29 U.S.C. 1054(g).

The Question Presented is whether a pension plan amendment that is authorized by ERISA Section 203(a)(3)(B) is nonetheless prohibited by Section 204(g) to the extent that it applies to previously accrued benefits.

PARTIES TO THE PROCEEDINGS BELOW

All of the parties to the proceedings below are named in the caption. Petitioner Central Laborers' Pension Fund is a multiemployer employee benefit plan and trust and has no corporate affiliations.

TABLE OF CONTENTS

QUESTION PRESENTED i
PARTIES TO THE PROCEEDINGS BELOW ii
TABLE OF CONTENTS iii
TABLE OF AUTHORITIES iv
BRIEF FOR THE PETITIONER 1
OPINIONS BELOW AND JURISDICTION 1
RELEVANT STATUTORY PROVISIONS 1
STATEMENT OF THE CASE 2
SUMMARY OF ARGUMENT 11
ARGUMENT 14
A PLAN AMENDMENT THAT, CONSISTENT WITH ERISA SECTION 203(A)(3)(B), AUTHORIZES A PENSION PLAN TO "SUSPEND" A PARTICIPANT'S "BENEFIT PAYMENTS" DURING THE PERIOD HE ENGAGES IN CERTAIN EMPLOYMENT DOES NOT "DECREASE" THE PARTICIPANT'S "BENEFITS" IN VIOLATION OF ERISA SECTION 204(G). 14
I. ERISA Section 203(a)(3)(B) Authorizes Pension Plans To Adopt Employment Disqualification Provisions That Apply To Pension Benefits Which Accrued Prior To The Adoption Of The Provisions 16
II. The Court of Appeals Erred In Extending Section 204(g)'s Prohibition On Plan Amendments That "Decrease" Participants' "Benefits" To Forbid The "Suspension" Of "Benefit Payments" Expressly Authorized By Section 203(a)(3)(B). 26
CONCLUSION 37

TABLE OF AUTHORITIES

Cases

Alaska Dep't of Env'tl Conserv. v. *EPA*, __ U.S. __, No. 02-658 (Jan. 21, 2004) 27
Alessi v. *Raybestos-Manhattan, Inc.*, 451 U.S. 504 (1981) 3, 4, 35
Atkinson v. *Sheet Metal Workers' Trust Funds*, 833 F.2d 864 (CA9 1987) 24
Bayles v. *Cent. States, S.E. & S.W. Area Pension Fund*, 462 F. Supp. 102 (N.D. Miss. 1978) 24
Comm'r v. *Keystone Consol. Indus.*, 508 U.S. 152 (1993) 4
Dameron v. *Sinai Hosp. of Balt.*, 815 F.2d 975 (CA4 1987) 32
Dennis v. *Bd. of Trustees*, 620 F. Supp. 572 (M.D. Pa. 1985) 25
Fort Halifax Packing Co. v. *Coyne*, 482 U.S. 1 (1987) 29
Geib v. *N.Y. State Teamsters Conference Pension & Ret. Fund*, 758 F.2d 973 (CA3 1985) 25
Harm v. *Bay Area Pipe Trades Pension Plan Trust Fund*, 701 F.2d 1301 (CA9 1983) 25
Hughes Aircraft Co. v. *Jacobsen*, 525 U.S. 432 (1999) 29
Inter-Modal Rail Employees Ass'n v. *Atchison, Topeka & Santa Fe Ry.*, 520 U.S. 510 (1997) 20, 29
John Hancock Mut. Life Ins. Co. v. *Harris Trust & Sav. Bank*, 510 U.S. 86 (1993) 17
Johnson v. *Franco*, 727 F.2d 442 (CA5 1984) 22
Jones v. *UOP*, 16 F.3d 141 (CA7 1994) 32
Lockheed Corp. v. *Spink*, 517 U.S. 882 (1996) 3, 29
Mead Corp. v. *Tilley*, 490 U.S. 714 (1989) 3
Mertens v. *Hewitt Assoc.*, 508 U.S. 248 (1993) 29
Milwaukee Brewery Workers' Pension Plan v. *Jos. Schlitz Brewing Co.*, 513 U.S. 414 (1995) 33

Nachman Corp. v. *Pension Benefit Guaranty Corp.*, 446 U.S. 359 (1980) 16, 29, 34
NLRB v. *Amax Coal Co.*, 453 U.S. 322 (1981) 25
Pete v. *United Mine Workers of Am.*, No. 1953-69, 1976 U.S. Dist. LEXIS 15,998 (D.D.C. Mar. 22, 1976) 24
Riley v. *MEBA Pension Trust*, 570 F.2d 406 (CA2 1977) 24
Smith v. *CMTA-IAM Pension Trust*, 654 F.2d 650 (CA9 1981) 20
Spacek v. *Maritime Ass'n, ILA Pension Plan*, 134 F.3d 283 (CA5 1998) 8, 9, 10, 30
Thompson v. *Asbestos Workers Local No. 53 Pension Fund*, 716 F.2d 340 (CA5 1983) 19
Whisman v. *Robbins*, 55 F.3d 1140 (CA6 1995) 9, 10, 28

Statutes

Employee Retirement Income Security Act of 1974
§ 3(19), 29 U.S.C. 1002(19) 4, 36
§ 3(25), 29 U.S.C. 1002(25) 34
§ 3(37), 29 U.S.C. 1002(37) 22
§ 203(a)(1), 29 U.S.C. 1053(a)(1) 5, 20
§ 203(a)(2), 29 U.S.C. 1053(a)(2) 5, 31
§ 203(a)(3)(B)(ii), 29 U.S.C. 1053(a)(3)(B)(ii) 5, 16, 18
§ 203(a)(3)(B), 29 U.S.C. 1053(a)(3)(B) ..... passim
§ 203(a)(3)(C), 29 U.S.C. 1053(a)(3)(C) 30
§ 203(a)(3)(E)(ii)(I), 29 U.S.C. 1053(a)(3)(E)(ii)(I) 30
§ 203(a)(3), 29 U.S.C. 1053(a)(3) 30, 31
§ 203(a), 29 U.S.C. 1053(a) ..... passim
§ 203(c), 29 U.S.C. 1053(c) 17
§ 203, 29 U.S.C. 1053 30
§ 204(b)(1)(H)(iii)(II), 29 U.S.C. 1054(b)(1)(H)(iii)(II) 31
§ 204(g)(1), 29 U.S.C. 1054(g)(1) 30

§ 204(g)(2), 29 U.S.C. 1054(g)(2) 5, 34
§ 204(g), 29 U.S.C. 1054(g) ..... passim
§ 302(c)(8), 29 U.S.C. 1082(c)(8) 2, 30
§ 4041A(d), 29 U.S.C. 1341a(d) 31
§ 4042(d)(1)(A)(v), 29 U.S.C. 1342(d)(1)(A)(v) 31
§ 4281(c)(1), 29 U.S.C. 1441(c)(1) 31
§ 4281(d), 29 U.S.C. 1441(d) 31
26 U.S.C. 411(d)(6) 15, 17
28 U.S.C. 1254(1) 1
29 U.S.C. 1301(a)(8) 30
29 U.S.C. 186(c)(5)(B) 21

Other Authorities

130 Cong. Rec. 23,487 (1984) 10, 34
EMPLOYEE BENEFIT RESEARCH INST., FUNDAMENTALS OF EMPLOYEE BENEFIT PROGRAMS (3d ed. 1987) 23
ERISA, Legislative History of the Employee Retirement Income Security Act, 1974 ..... 22, 23, 33
H.R. Rep. No. 98-655, 98th Cong., 2d Sess. (1984) 35
IRS Multiemployer Plan Examination Guidelines (May 4, 2001) 27
JOHN H. LANGBEIN & BRUCE A. WOLK, PENSION & EMPLOYMENT BENEFIT LAW (3d ed. 2000) 22
S. Rep. No. 98-575, 98th Cong., 2d Sess. (1984) 34

Regulations

26 C.F.R. 1.411(a)-4(b)(2) 18
26 C.F.R. 1.411(c)-1(f) 27
26 C.F.R. 1.411(d)-4 27
29 C.F.R. 2530.203-3(a) 5, 18
29 C.F.R. 2530.203-3(b)(1) 36
29 C.F.R. 2530.203-3(b)(2) 5

BRIEF FOR THE PETITIONER

OPINIONS BELOW AND JURISDICTION

The district court's opinion granting petitioner judgment on the pleadings (Pet. App. 32a-45a) is unpublished. The opinion of the court of appeals reversing the district court (*id.* 3a-31a) is published at 302 F.3d 802. The court of appeals issued its opinion and order on September 13, 2002. This Court granted certiorari on December 1, 2003. This Court has jurisdiction pursuant to 28 U.S.C. 1254(1).

RELEVANT STATUTORY PROVISIONS

ERISA Section 203(a)(3)(B), 29 U.S.C. 1053(a)(3)(B), provides in relevant part:

> (a) Nonforfeitability requirements. Each pension plan shall provide that an employee's right to his normal retirement benefit is nonforfeitable upon the attainment of normal retirement age * * *.
>
> * * * *
>
> (3) * * * (B) A right to an accrued benefit derived from employer contributions shall not be treated as forfeitable solely because the plan provides that the payment of benefits is suspended for such period as the employee is employed, subsequent to the commencement of payment of such benefits –
>
> (i) in the case of a plan other than a multiemployer plan, by an employer who maintains the plan under which such benefits were being paid; and
>
> (ii) in the case of a multiemployer plan, in the same industry, in the same trade or craft, and the same geographic area covered by the plan, as when such benefits commenced.
>
> The Secretary [of Labor] shall prescribe such regulations as may be necessary to carry out the purposes of this subparagraph, including regulations with respect to the meaning of the term "employed."

ERISA Section 204(g), 29 U.S.C. 1054(g), provides in relevant part:

> (g) Decrease of accrued benefits through amendment of plan.
>
> (1) The accrued benefit of a participant under a plan may not be decreased by an amendment of the plan, other than an amendment described in section 302(c)(8) or 4281.
>
> (2) For purposes of paragraph (1), a plan amendment which has the effect of –
>
> (A) eliminating or reducing an early retirement benefit or a retirement-type subsidy (as defined in regulations), or
>
> (B) eliminating an optional form of benefit,
>
> with respect to benefits attributable to service before the amendment shall be treated as reducing accrued benefits. In the case of a retirement-type subsidy, the preceding sentence shall apply only with respect to a participant who satisfies (either before or after the amendment) the preamendment conditions for the subsidy. The Secretary of the Treasury shall by regulations provide that this paragraph shall not apply to any plan amendment which reduces or eliminates benefits or subsidies which create significant burdens or complexities for the plan and plan participants, unless such amendment adversely affects the rights of any participant in a more than de minimis manner.

STATEMENT OF THE CASE

This is a case under the Employee Retirement Income Security Act (ERISA). Petitioner Central Laborers' Pension Fund administers a multiemployer pension plan (the Plan) governed by the statute. Respondents, who are each participants in the Plan, allege that an amended plan provision promulgated under ERISA Section 203(a)(3)(B) – which authorizes plans to adopt provisions under which "the payment of benefits is suspended" during the period that a retiree returns to the workforce in certain capacities – violates ERISA Section 204(g) (the anti-cutback rule). Rejecting both the regulatory guidance provided by the United States and the views of its sister circuits, a divided panel of the court of appeals agreed.

1. This case involves two provisions of ERISA that regulate participants' "benefits" and "benefit payments," terms that have distinct meanings under the statute. A pension "benefit" is a right, pursuant to the plan, to a stream of payments during the participant's lifetime. The benefit is not a guarantee that the participant will receive a minimum amount of money over the course of retirement, for the participant may die after 30 months or 30 years. See *Lockheed Corp.* v. *Spink*, 517 U.S. 882, 894 (1996) ("ERISA 'leaves th[e] question' of the content of benefits 'to the private parties creating the plan.'" (quoting *Alessi* v. *Raybestos-Manhattan, Inc.*, 451 U.S. 504, 511 (1981))). See also *Alessi*, 451 U.S. at 514 (holding that under ERISA, "benefits [are] defined merely as those 'under the plan'" (citing 29 U.S.C. §§ 1002(22), (23))).

Respondents, for example, began receipt of "Service-Only Pensions" under the Plan when each was age 39. The monthly payments on this early retirement benefit are the same as on a full normal retirement pension, except that they start prior to normal retirement age. J.A. 34, 36, 38 (Plan §§ 1.14, 3.2, 3.14).[1] Participants qualify by accruing "30

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[1] Because the benefit on a Service-Only Pension is not reduced to account for the fact that the participant is receiving benefit payments before normal retirement age, it is referred to as a "subsidized" benefit under ERISA. See *Mead Corp.* v. *Tilley*, 490 U.S. 714, 719 (1989) (detailing example of unsubsidized and subsidized pension benefit). Compare J.A. 37 (Plan § 3.6) (establishing "Early Retirement Pension," a second form of early retirement benefit offered by the Fund that, unlike the Service-Only Pension, is "unsubsidized" because it is reduced to account for the

Pension Credits or 30 Years of Vesting Service." *Id.* at 38 (Plan § 3.13). The Plan quantifies the benefit on a Service-Only Pension based on a formula embodied in a table set forth in the plan document that is based on standard actuarial assumptions. The table accounts for the participant's years of service and the anticipated lifespan of a person at normal retirement age. *Id.* at 57-62 (Plan § 3.4).

A "benefit payment" is a periodic amount payable to the retiree from the pension fund. The Plan in this case provides that a participant is entitled to a monthly benefit payment in the amount determined under the table. J.A. 57-62 (Plan § 3.4). See, *e.g.*, *Comm'r* v. *Keystone Consol. Indus.*, 508 U.S. 152, 154 (1993) ("A 'defined benefit pension plan,' as its name implies, is one where the employee, upon retirement, is entitled to a fixed periodic payment. The size of that payment usually depends upon prior salary and years of service."). For each of the respondents, the benefit computed under the Plan amounted to approximately $1650 a month, and upon their retirement each of the respondents began receiving monthly benefit payments in that amount from the Plan.

2. ERISA protects participants' benefits in rules governing "vesting" and "accrual." A plan "both must ensure nonforfeiture of all accrued benefits derived from employee contributions and must use vesting and accrual rates assuring portions of the benefits derived from the employer contributions should the employee leave the job before the normal retirement age." *Alessi*, 451 U.S. 513 n.10.

The vesting rules, principally including Section 203(a), 29 U.S.C. 1053(a), set forth the schedules and circumstances under which a participant's benefits must be "nonforfeitable" – *i.e.*, rules determining when the participant's "right" to

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early age at which benefits are claimed). The Plan defines normal retirement age as age 65 (or later under some circumstances). J.A. 34 (Plan § 1.14).

benefits must be "unconditional." § 3(19), 29 U.S.C. 1002(19). These rules provide participants with a legal assurance that benefits will be paid. Benefits attributable to the participant's own contributions are nonforfeitable immediately. § 203(a)(1), 29 U.S.C. 1053(a)(1). Benefits attributable to employer contributions vest on schedules set forth in the plan document that conform to restrictions set by the statute. § 203(a)(2), 29 U.S.C. 1053(a)(2).

Section 203(a)(3)(B) of ERISA furthermore permits plans to render forfeitable the benefits of a retiree who returns to the workforce. A plan may "provide[] that the payment of benefits is suspended for such period as the employee is employed, subsequent to the commencement of payment of such benefits," under certain circumstances. In the case of a multiemployer plan, suspension may be triggered by employment "in the same industry, in the same trade or craft, and the same geographic area covered by the plan." § 203(a)(3)(B)(ii), 29 U.S.C. 1053(a)(3)(B)(ii).[2] Once the participant leaves disqualifying employment, payments are restored and the participant's "benefit" remains the same as defined under the plan. 29 C.F.R. 2530.203-3(b)(2).

ERISA's separate accrual rules, set forth in Section 204, protect against the circumvention of the vesting rules. Among the accrual provisions is Section 204(g), which (with limited exceptions not relevant here) prohibits plan amendments that "decrease" previously accrued "benefits." 29 U.S.C. 1054(g). In 1984, Congress specified that this anti-cutback rule applies to early retirement benefits. An amendment that "has the effect" of "reducing an early

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[2] As explained by the accompanying regulations, this restriction applies to the suspension of normal retirement benefits and unsubsidized (*i.e.*, actuarially reduced) early retirement benefits; less rigorous standards apply to subsidized early retirement benefits. See 29 C.F.R. 2530.203-3(a). The distinction is immaterial in this case, however, because the Plan provision challenged by respondents tracks the restrictions of the statute.

retirement benefit * * * with respect to benefits attributable to service before the amendment shall be treated as reducing accrued benefits." § 204(g)(2), 29 U.S.C. 1054(g)(2).

3. Petitioner Central Laborers' Pension Fund (the Fund) administers a multiemployer pension plan subject to ERISA. Most participants in the Plan, including respondents Thomas E. Heinz and Richard J. Schmitt, Jr., are construction workers in central Illinois. At all times relevant to this case, the Plan has contained a disqualifying employment provision pursuant to Section 203(a)(3)(B) and its implementing regulations. See J.A. 42-48, 51, 55, 63-68, 71-77 (Plan § 6.7 (as amended)). This provision states that the Plan will "suspend" the payment of benefits to retirees who engage in "disqualifying employment." *Id.*

The Plan provides that it may be amended, and furthermore expressly states that the definition of "disqualifying employment" may be modified. See J.A. 23 (summary plan description noting power to amend), 46 ("If benefits have been suspended and payment resumed, new notification shall, upon resumption, be given to the Participant, if there has been any *material change* in the suspension rules or the identity of the industries or area covered by the Plan." (Plan § 6.7(d)(1)) (emphasis added)), 50 (amendment provision (Plan § 8.1)). See also *id.* at 64 (Plan § 6.7(e)(1)), 74 (Plan § 6.7(f)(1)). On that basis, the trustees have repeatedly amended the definition of "disqualifying employment" to account for current circumstances confronting the Plan. See, *e.g.*, *id.* at 42-43, 51, 63-64 (Plan § 6.7). For example, during a peak in regional demand for construction labor in 1994, the trustees adopted a less restrictive provision, pursuant to which the benefits of participants receiving a Service-Only Pension would not be suspended unless they worked more than 40 hours per month in disqualifying employment; previously, any amount of part- or full-time work had triggered suspension. See *id.* at 43.

After that amendment, the Plan's trustees were informed in 1997 that the Plan had suffered a $30 million net actuarial loss in one year, primarily due to the payment of Service-Only Pensions to participants aged 53 or younger. See *id.* at 79 (McAnarney Aff. ¶ 9); *id.* at 83 (Dean Aff. ¶ 6). The trustees responded by amending the Plan in several respects, including by adjusting the definition of disqualifying employment for persons who had retired before age 53 to eliminate the recently adopted 40-hour minimum and to include work as construction *supervisors*; previously, only construction *labor* had been included in the definition. See J.A. 63 (Plan § 6.7(b)(1)), 79 (McAnarney Aff. ¶ 10). That definition applies to benefits that had accrued prior to the amendment's adoption. *Id.* at 63.

Respondents stopped working as laborers in 1996 at the age of 39. They then applied for and began receiving Service-Only Pensions under the Plan. Both promptly took jobs in central Illinois as construction supervisors. Respondents' employment was not disqualifying under the Plan at the time of their original retirement. When the Plan's disqualifying employment provision was amended in 1998 to encompass supervisory work, the trustees notified respondents, both of whom chose to remain in their jobs. The Plan has suspended their benefit payments, citing their employment as construction supervisors.

4. Respondents brought this suit challenging the nation's pension plans' longstanding practice of applying amended employment disqualification provisions to previously accrued benefits. Respondents specifically contend that the 1998 Plan amendment that extended the definition of disqualifying employment to include construction supervisors (hereinafter "the Suspension Provision") is unlawful. Respondents do not claim that the Suspension Provision violates Section 203(a)(3)(B). Nor do they contend that the Suspension Provision violates the terms of the Plan or the trustees'

obligations under ERISA to act as fiduciaries for both the Plan's participants and beneficiaries.[3]

Respondents instead assert that, because their pension benefits had already accrued when the Suspension Provision was adopted, that plan amendment "decreased" their Service-Only Pensions in violation of ERISA's anti-cutback rule. But in making that claim, respondents do not directly challenge the withholding of their monthly checks. Furthermore, respondents do not dispute that their benefits will be paid in the same monthly amount as defined under the Plan as soon as respondents elect to leave disqualifying employment. Respondents nevertheless contend that the mere *adoption* of the Suspension Provision added a "condition" – *i.e.*, a restriction on receiving retirement benefit payments while simultaneously working as construction supervisors – that effectively "decreased" their Service-Only Pensions.

a. The district court rejected respondents' argument, granting the Fund judgment on the pleadings. See Pet. App. 32a-45a. The court agreed with the Fifth Circuit's holding in *Spacek* v. *Maritime Ass'n, ILA Pension Plan*, 134 F.3d 283 (1998), that an otherwise lawful plan amendment relating to disqualifying employment does not violate Section 204(g). Pet. App. 37a. The Fifth Circuit in *Spacek*, after carefully examining the statutory language and the guidance provided by the government, concluded that Section 203(a)(3)(B) "authorizes the very type of amendment at issue in this case, and * * * § [204](g) in no way limits this authorization." *Spacek*, 134 F.3d at 290.

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[3] The Suspension Provision applies to work with an employer in any capacity in the construction industry. J.A. 63 (Plan § 6.7(b)(1)). Respondents contended below that the trustees' interpretation of this provision to include their supervisory work was "arbitrary and capricious." The district court rejected that argument. Pet. App. 45a. Because the court of appeals did not reach the question, it is not presented in this Court.

b. A divided panel of the Seventh Circuit reversed the district court. The majority apparently recognized that, in withholding monthly payments from respondents, the Plan had "suspended" their "benefit payments" and had not "decreased" their "benefits." See Pet. App. 14a, 15a, 20a. But it "reject[ed]" the view – adopted by the Fifth Circuit in *Spacek* as well as the Sixth Circuit in *Whisman* v. *Robbins*, 55 F.3d 1140 (1995) – that an amended employment disqualification provision that comports with ERISA Section 203(a)(3)(B) does not violate Section 204(g). Pet. App. 3a, 4a.

The majority instead agreed with respondents that Section 204(g) implicitly forbids every plan amendment that places material conditions on the payment of previously accrued benefits, including conditions authorizing the suspension of benefit payments as provided by Section 203(a)(3)(B). "A participant's benefits cannot be understood without reference to the conditions imposed on receiving those benefits, and an amendment placing materially greater restrictions on the receipt of the benefit 'reduces' the benefit just as surely as a decrease in the size of the monthly benefit payment." Pet. App. 9a. On this view, "it is *not the suspension* of benefit payments that offends the anti-cutback rule, *but the change* (to the detriment of the participant) *in the conditions* triggering the suspension." *Id.* at 15a (emphases added). According to the court, at the time of their "retirement," respondents "had the right under the plan to work as construction supervisors and continue to receive their monthly benefit payments." *Id.* at 8a. Thus, respondents' "loss of the option of working as construction supervisors was a reduction of their early retirement benefits." *Id.* at 9a.

On that basis, the majority deemed it immaterial that the Plan had only "suspended" respondents' "benefit payments" rather than "decreasing" their "benefits." Instead, the Seventh Circuit found it dispositive that respondents lost the suspended payments forever. "Although with a suspension the interruption in benefit payments is temporary, the retiree

never recovers the payments lost during the employment period. The amendment thus 'eliminates' monthly benefit payments for participants who take certain jobs after retirement and 'reduces' the participant's total early retirement benefits by an amount determined by how long the disqualifying work continues." Pet. App. 10a.

Judge Cudahy dissented. See Pet. App. 24a-31a. He viewed the Fifth Circuit's reasoning in *Spacek*, like that of the Sixth Circuit in *Whisman*, as "straightforward," in contrast to the panel majority's "sometimes tortured contentions" and "implausible and unconvincing arguments that do violence to the clear intent of the drafters." *Id.* at 24a, 31a. Judge Cudahy explained that the Plan's position was supported by ERISA's "plain meaning," given the many statutory provisions that treat an authorized "suspension" of benefit payments as distinct from a prohibited decrease in benefits. *Id.* at 24a. The participants' loss of suspended payments is "acceptable if they withdraw from retirement and return to the workforce, later to place additional demands upon the plan. They suffer no loss of regular income and are merely deprived of a bonus in the form of a dual recovery at the expense of the construction industry. Meanwhile, the financial integrity of the plan may be affected by continuing to make retirement provisions for participants who have not really retired." *Id.* at 31a (Cudahy, J., dissenting). That conclusion was confirmed by the legislative history, including the statement by the principal sponsor of the 1984 statutory amendment (which extended Section 204(g) to early retirement benefits) that the amendment was not "intended to apply to benefit changes authorized by existing law," "including the authorization for multiemployer plans to adopt stricter rules for the suspension of subsidized early retirement benefits." 130 Cong. Rec. 23,487 (1984) (statement of Rep. Clay). See Pet App. 15a-16a.

5. This Court subsequently granted certiorari (124 S. Ct. 803 (2003)), consistent with the recommendation of the Solicitor General on behalf of the United States, which had

expressed the view in an invited *amicus* brief that "[t]he court of appeals erred in concluding that a 'suspension' of the payment of early retirement benefits that results from an amendment to the post-retirement 'disqualifying employment' provision of the plan is a 'reduction' of plan benefits for the employees who retired before adoption of the amendment and is therefore prohibited under the anti-cutback rule of Section 204(g) of ERISA." U.S. Cert. *Amicus* Br. 5.

SUMMARY OF ARGUMENT

I. Congress has assigned the Secretary of Labor and the Secretary of the Treasury the responsibility to implement ERISA's comprehensive and reticulated provisions. Those regulatory authorities have determined that the right conferred by ERISA to temporarily suspend the benefit payments of a participant who returns to the workforce extends to all of the participant's retirement benefits, not merely to those benefits that accrue subsequent to the provision's adoption. For decades, the nation's pension plans have relied on that guidance in adjusting their employment disqualification provisions to account for present labor conditions and economic circumstances. The view of the ERISA regulatory authorities is correct, and respondents' attempt to impose broad retroactive liability on pension plans should be rejected.

ERISA Section 203(a)(3)(B) authorizes pension plans to adopt provisions under which the payment of benefits to a participant is temporarily suspended in a single circumstance: during "such period as the employee is employed, subsequent to the commencement of payment of such benefits," in certain capacities that are spelled out in the statute and its implementing regulations. Respondents do not dispute that the plan provision they challenge complies fully with this unambiguous authority, which contains no hint of the limitation they propose.

The government's view that Section 203(a)(3)(B) applies fully to previously accrued benefits also comports with Congress's understanding and its expression of the statute's

purpose. Although ERISA protects participants' expectations that their accrued benefits will be paid, the very purpose of Section 203(a) – which addresses the vesting of participants' rights – is to specify what expectations are reasonable. In Section 203(a)(3)(B), Congress did so, while protecting the interests of participants in several ways: by placing the prospect of suspension completely within the control of the participant, who decides whether and when to rejoin the workforce, as well as whether and when to return to retirement; by specifying the forms of employment to which disqualification attaches; by forbidding the forfeiture of benefits attributable to the employee's own contributions (as opposed to the employer's contributions); and by providing that the plan may only suspend benefit payments for the period of re-employment rather than reducing the participant's benefits.

Contrary to the Seventh Circuit's view, ERISA does not implicitly confer on participants any broader "right" to work after retirement, much less a right that trumps an otherwise lawful employment disqualification provision. Congress expressed no special solicitude for persons who return to work after retirement, and who thereby secure a further income and potentially a further pension.

Section 203(a)(3)(B) can accomplish Congress's objectives only if the suspension of benefits extends to previously accrued benefits. The purpose of an employment disqualification provision is to respond to present (and oftentimes changing) circumstances, particularly including shifts in labor markets and the plan's current financial health. For example, plans loosen restrictions on re-employment when there is a greater need for labor, and tighten restrictions when jobs are in short supply such that employment of retirees (subsidized by their pensions) would undercut workers who may not yet be eligible for retirement. A plan provision that applied only to benefits that accrue in the future would have no effect on the conduct of participants already in

retirement and thus would utterly fail in fulfilling these objectives.

Respondents' reading would therefore disadvantage plans and participants in a way that Congress could not have intended. If prohibited by Section 204(g) from amending their employment disqualification provisions to impose further restrictions on re-employment, plans will simply adopt the most stringent provisions permitted by the statute from the outset.

II. Just as the Secretaries of Labor and the Treasury have determined that the power conferred by Section 203(a)(3)(B) extends to benefits that accrued prior to the adoption of a suspension provision, so too those regulatory authorities have determined that the "anti-cutback" rule of Section 204(g) does not call for a contrary result. That conclusion is sound as well.

Section 204(g) forbids plan amendments that "decrease" previously accrued "benefits." The Seventh Circuit essentially acknowledged that the "suspension" of "benefit payments" under Section 203(a)(3)(B) does not "decrease" a participant's "benefits" as those terms are used in ERISA. A suspension is the withholding of particular payments, whereas a decrease is a reduction of the benefit amount identified by the formula under the plan. In this case, when respondents elected to continue to work as construction supervisors despite the terms of the Suspension Provision, the Plan suspended their monthly benefit payments. But respondents' "benefits" remain the same as when they originally retired and will be paid at the same monthly rate when they elect to leave disqualifying employment.

If Congress had intended to adopt the rule that respondents propose, it could have and would have specified in Section 204(g) that a plan may not adopt an amendment that suspends payments on previously accrued benefits. Its failure to do so is telling, for the distinction between a

prohibited decrease and an authorized suspension is well established by other provisions of ERISA.

That conclusion is buttressed by ERISA's drafting history and the statute's legislative history. The provisions that became Sections 203(a)(3)(B) and 204(g) were added to the same section of the draft bill simultaneously. Yet nothing in the legislative history suggests that Congress intended the latter to limit the reach of the former. Similarly, the legislative history of the 1984 amendment to ERISA specifying that Section 204(g) applies to early retirement benefits indicates that Congress did not intend to modify the vesting rules established in Section 203(a).

The Seventh Circuit's contrary arguments are unavailing. The theory of the majority below was that a plan's adoption of an employment disqualification provision adds a new "condition" on participants' benefits in violation of Section 204(g). But such a condition applies to the participant's post-retirement employment, which is not a "benefit" protected by either ERISA or the Plan, and which, *ipso facto*, is not a "benefit" that can be "decreased" in violation of the anti-cutback rule. Beyond that, the court of appeals' reasoning fails for the reason that a "condition" imposed by an employment disqualification provision is expressly authorized by ERISA's vesting rules. Section 203(a)(3)(B) is one of the provisions under which a plan is authorized to depart from the general rule that participants' accrued benefits must be "unconditional." § 3(19), 29 U.S.C. 1002(19).

The judgment of the Seventh Circuit accordingly should be reversed.

ARGUMENT

A PLAN AMENDMENT THAT, CONSISTENT WITH ERISA SECTION 203(A)(3)(B), AUTHORIZES A PENSION PLAN TO "SUSPEND" A PARTICIPANT'S "BENEFIT PAYMENTS" DURING THE PERIOD HE ENGAGES IN CERTAIN EMPLOYMENT DOES NOT

"DECREASE" THE PARTICIPANT'S "BENEFITS" IN VIOLATION OF ERISA SECTION 204(G).

In Section 203(a) of ERISA, Congress expressly authorized pension plans to adopt plan provisions that temporarily "suspend" the "payment of benefits" in one carefully delimited situation: when a retiree returns to the workforce in disqualifying employment. § 203(a)(3)(B), 29 U.S.C. 1053(a)(3)(B). The ERISA regulatory authorities – the Secretaries of Labor and the Treasury – have correctly recognized that this authorization extends equally to provisions that apply to the payment of benefits which have previously accrued as well as to provisions governing subsequently accrued benefits. And the ERISA regulatory authorities have also correctly recognized that ERISA Section 204(g) – the "anti-cutback" rule – does not override the Section 203(a)(3)(B) authorization.

In reliance on that clear guidance from the government, as well as on two courts of appeals decisions adopting the government's position, the nation's pension plans have for decades amended their provisions governing disqualifying employment on an ongoing basis to take account of the current circumstances in the local labor market and in the plan's financial health. Respondents contend that the many pension plan amendments increasing the scope of disqualifying employment adopted over the past decades are illegal. Respondents' argument would not only bar these provisions from operating with respect to current retirees and non-retirees who have previously accrued benefits, but would also put plans containing such provisions at risk of losing their tax-exempt status. See 26 U.S.C. 411(d)(6) (parallel provision to Section 204(g) providing that a pension plan is not a qualified plan if an amendment decreases benefits in violation of the anti-cutback rule); *id.* 401(a)(7) (providing that a plan is not qualified for tax-exempt status unless it complies with Section 411). There is no legitimate basis for imposing such broad retroactive liability on the nation's pension plans, their participants, and contributing employers.

I. ERISA Section 203(a)(3)(B) Authorizes Pension Plans To Adopt Employment Disqualification Provisions That Apply To Pension Benefits Which Accrued Prior To The Adoption Of The Provisions.

Section 203(a)(3)(B) of ERISA addresses the suspension of the payment of pension benefits during periods of disqualifying employment. That provision is among the statutory "vesting" rules – the rules delimiting the pension benefits which, once promised and earned, the plan has a legal obligation to pay and which the participant has a legal right to receive. These vesting rules effectuate the purpose of assuring that the plan will provide retirees the retirement income they have been promised. See *Nachman Corp.* v. *Pension Benefit Guaranty Corp.*, 446 U.S. 359, 375 (1980).

Section 203(a) contains several provisions specifying circumstances in which, notwithstanding the general vesting rules, a plan is not obligated to pay benefits. Section 203(a)(3)(B), in particular, authorizes pension plans to withhold participants' benefit payments; that is, it authorizes a plan to "suspend[]" the "payment of benefits" attributable to employer contributions during the period that a retiree returns to the workforce in certain capacities.

This case turns on the scope of the authority conferred by Section 203(a)(3)(B). Respondents contend – and the Seventh Circuit concluded – that the statute merely authorizes plans to provide for the suspension of the payment of those benefits that accrue *after* the disqualifying employment provision is adopted. By contrast, the regulatory guidance issued by the ERISA regulatory authorities has consistently reflected their understanding that Section 203(a)(3)(B) authorizes plans to adopt provisions that apply to payments with respect to the *entire* benefit – both the portion that has accrued prior to, and the portion to be accrued after, the adoption of the suspension provision. This construction of Section 203(a) is entirely sound.

1. Section 203(a)(3)(B) states that a plan may "provide[] that the payment of benefits is suspended for such period as the employee is employed, subsequent to the commencement of payments of such benefits," in certain capacities. For multiemployer plans, suspension may be triggered by work "in the same industry, in the same trade or craft, and the same geographic area covered by the plan." § 203(a)(3)(B)(ii), 29 U.S.C. 1053(a)(3)(B)(ii). See *supra* at 5 n.2. ERISA on its face thus permits plans to suspend the payment of *all* benefits derived from employer contributions. There is simply no language whatsoever suggesting that, as respondents contend, suspension must be limited to those benefits that accrue after the adoption of a plan provision addressing employment disqualification. "To change the rules governing suspensions is merely to create a suspension with a little different design than an earlier one. The rules addressing the consequences of invoking a suspension necessarily encompass changes leading to a new form of suspension." Pet. App. 30a (Cudahy, J., dissenting).

Congress was well aware of how to restrict plan amendments relating to vesting. Section 203(c), for example, provides that "[a] plan amendment changing any vesting schedule under the plan" is impermissible if it decreases "the nonforfeitable percentage of the accrued benefit derived from employer contributions" or if participants with at least three years of service are not permitted "to elect" to vest under the old schedule. § 203(c), 29 U.S.C. 1053(c). But Congress imposed no such restriction in Section 203(a)(3)(B).

The governing regulations, like the statutory text, accordingly provide that plan provisions relating to the suspension of benefits may apply to previously accrued benefits. The Department of Labor, which "shares enforcement responsibility for ERISA with the Department of the Treasury" (see *John Hancock Mut. Life Ins. Co.* v. *Harris Trust & Sav. Bank*, 510 U.S. 86, 107 n.14 (1993)), issued regulations implementing Section 203(a)(3)(B) more than two decades ago. The regulations authorize plans, without

qualification or limitation, to 'provide[] that the payment of benefits is suspended during certain periods of reemployment which occur subsequent to the commencement of payment of such benefits." See 29 C.F.R. 2530.203-3(a). The Secretary of the Treasury, in turn, has adopted the Department of Labor regulations for purposes of the provision of the Internal Revenue Code (26 U.S.C. 411(d)(6)) that parallels Section 203(a)(3)(B). See 26 C.F.R. 1.411(a)-4(b)(2). On that basis, the IRS has "consistently approved plan amendments that have provided for the suspension of post-retirement benefits under employment disqualification provisions that conform to Section 203(a)(3)(B)." U.S. Cert. *Amicus* Br. 13-14.

2. The ERISA regulatory authorities' construction of Section 203(a)(3)(B) is consistent not only with the statutory text, but with the provision's purpose.

Contrary to the Seventh Circuit's decision, ERISA does not generate and does not protect a participant's "expectation" that he will always be paid retirement benefits while engaging in further employment that provides not only extra income but also potentially earns him a second pension. To the contrary, the statute makes it plain that ERISA does *not* assure the payment of benefits to retirees who re-enter the workforce in certain capacities.

ERISA does so through Section 203(a)(3)(B), which authorizes multiemployer plans to define disqualifying employment to include any work "in the same industry, in the same trade or craft, and the same geographic area covered by the plan." § 203(a)(3)(B)(ii), 29 U.S.C. 1053(a)(3)(B)(ii). Given that authorization, the fact that the plan broadens its disqualification provision from *some* such work to *all* such work after a participant's benefits have accrued disturbs no expectation generated by ERISA and no right protected by ERISA.

There is nothing in the statute or its legislative history suggesting a congressional intent to create or protect a right of "retirees" to work post-retirement in particular job capacities

while being paid retirement benefits. To the contrary, the very enactment of the disqualification provisions of Section 203(a)(3)(B) signifies that Congress determined that retirees who take disqualifying employment have the weakest of claims to the plan's assets.[4]

Although Section 203(a)(3)(B) tempers participants' expectations regarding the receipt of benefit payments during periods of re-employment, it bears emphasizing that the statute does so in a measured manner. Most fundamentally, the participant has *complete* control over whether disqualification occurs and, if it does occur, he has *complete* control over how long disqualification lasts. The plan must make payments to a participant who retires unless and until that participant elects to leave retirement, and the participant is always able to secure restored pension payments. While "ERISA was designed to protect working people in their retirement pension rights," those rights "are protected" during the period in which benefits are suspended pursuant to Section 203(a)(3)(B) because "retirement payments are in suspension only until he actually retires." *Thompson* v. *Asbestos Workers Local No. 53 Pension Fund*, 716 F.2d 340, 342 (CA5 1983). As respondents freely concede, "Even under the amended version of the plan at issue in this litigation, Messrs. Heinz and Schmitt are entitled to receive their pensions * * * merely by choosing to stop working altogether, or even simply by going to work in an unrelated industry." BIO 14 n.10.

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[4] Nor did the Plan itself confer on participants a "right" to work in any particular capacity after "retirement." To the extent the Plan addresses the issue at all, it defines respondents' Service-Only Pension in dollar terms (as opposed to a limited number of conditions on benefit payments), provides that the Plan's provisions may be amended in the future, and specifically contemplates that amendments to the disqualification provisions would apply to participants who had previously retired. See *supra* at 6.

Further, the scope of disqualifying employment is circumscribed. In order to avoid "forcing pension-age workers into complete retirement, Congress limited permissible suspensions [of normal retirement benefits] to those imposed only while the otherwise eligible plan member remained employed in the same industry, same trade, and same geographic area covered by his plan." *Smith* v. *CMTA-IAM Pension Trust*, 654 F.2d 650, 658 n.9 (CA9 1981). The plan provision challenged by respondent, for example, is triggered by re-employment in the construction trade in central Illinois. See J.A. 63 (Plan § 6.7(b)(1)), 32 & 56 (Plan § 1.6 (definition of Employer)).

Section 203(a)(3)(B) moreover strictly circumscribes the actions a plan may take even if a participant engages in disqualifying employment. The plan may only temporarily "suspend" the participant's "benefit payments." Section 203(a)(3)(B) does not authorize the plan to redefine the amount of the benefit that the plan has a continuing legal obligation to pay. The only authority is to withhold particular payments while the retiree remains in disqualifying employment; the plan may not reduce or eliminate the benefit to which the participant is entitled after the period of suspension ends. In addition, benefits derived from the participant's own contributions to the pension plan are inviolate, even upon the participant's return to the workforce. See § 203(a)(1), 29 U.S.C. 1053(a)(1).[5] And suspension of benefits is forbidden under any circumstance for participants who reach their "required beginning date" as that term is defined in the Internal Revenue Code, which generally is 70 1/2. See 26 U.S.C. 401(a)(9)(C).[6]

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[5] In this case, all of respondents' benefits are derived entirely from contributions by their employers.

[6] There is also considerable protection afforded to participants by "the formal procedures set forth in the plan" to adopt amendments. *Inter-Modal Rail Employees Ass'n* v. *Atchison, Topeka & Santa Fe Ry.*, 520 U.S. 510, 516 (1997); *ibid.* (in amendment, plan is forbidden "to 'discharge, fine, suspend, expel, discipline, or discriminate against' the plan's participants and beneficiaries 'for the purpose of interfering with [their] attainment of * * * rights * * * under the plan'" (alterations in original)). Amendments are furthermore only adopted upon approval by the board of trustees, which in the case of a multiemployer plan is composed equally of representatives of management and labor. 29 U.S.C. 186(c)(5)(B).

3. Equally to the point, the ERISA regulatory authorities' construction of Section 203(a)(3)(B) is sound because it effectuates Congress's purpose to authorize plans to calibrate their employment disqualification provisions to the changing labor markets and economic circumstances confronting them at any particular moment in order to further the interests of all their participants. A plan can only adapt effectively to changing conditions through disqualification provisions that encompass *all* benefits, not merely those benefits that would accrue subsequent to the adoption of an amended disqualification provision. The Seventh Circuit is entirely mistaken in its conjecture that it is sufficient to accomplish the purposes of Section 203(a)(3)(B) that "the anti-cutback rule does not prohibit the Fund from curbing certain reemployment prospectively, that is, by using the new definition of disqualifying employment to suspend the portion of the benefit payment attributable to service after the amendment." Pet. App. 10-11a n.6.

Plans constantly confront diverse and changing circumstances that necessitate modifying the scope of "disqualifying employment." As described by ERISA's principal sponsor in the House of Representatives, individual plans' definitions of disqualifying employment would need to be adjusted to account for "the particular facts and circumstances of the industry; the objectives of industrial stability; the conditions of employment and earnings in the industry; the benefit payment period of the plan; and the burden of onerous and costly administrative procedures

imposed upon the plan by these provisions." 3 ERISA, Legislative History of the Employee Retirement Income Security Act, 1974, at 4669-70 (statement of Rep. Dent) [hereinafter ERISA Legis. Hist.]. The point is illustrated by *Johnson* v. *Franco*, 727 F.2d 442 (CA5 1984). There, the court of appeals recognized that:

> the initial more stringent limitations upon any maritime employment arose in an effort to assure that those who collected benefits were really retired from the maritime industry and thus in need of the benefits, that the more liberalized later restrictions were designed to encourage more senior [union] members to retire and to create openings in union jobs for other younger [union] members who faced unemployment in changing economic conditions, and that some of the restrictions (later abandoned) for employment on American flag and [union]-contract vessels were designed to ensure that maritime employers contributing to the [union] plan did not simultaneously pay the same person both a union pension (through their contributions to the pension fund) and a salary while he was working.

Id. at 447-48.

Pension plans thus confront the ongoing task of facilitating the ability of their participants to find work and the ability of employers to find workers. These concerns are particularly relevant for multiemployer plans, like the Plan in this case, which often include participants from many employers in a single trade and geographic region. Multiemployer plans are also common in industries characterized by irregular employment or frequent shifts of workers between employers (which are often small in size and which are consequently more vulnerable to the cyclical nature of the economy). See JOHN H. LANGBEIN & BRUCE A. WOLK, PENSION & EMPLOYMENT BENEFIT LAW 62-63 (3d ed. 2000) (citing EMPLOYEE BENEFIT RESEARCH INST., FUNDAMENTALS OF EMPLOYEE BENEFIT PROGRAMS 55-59 (3d

ed. 1987)). See also § 3(37), 29 U.S.C. 1002(37) (defining a multiemployer plan as one "maintained pursuant to one or more collective bargaining agreements * * * to which more than one employer is required to contribute").

Pension plans therefore regularly modify their employment disqualification provisions in response to short-term changes in labor markets. When employers are in need of workers, plans loosen disqualification restrictions on re-employment in order to encourage broader participation in the workforce. By limiting the suspension of benefit payments for participants who have already entered early retirement, plans create financial incentives for experienced and skilled workers to fill gaps in the job market. In this case, for example, as noted *supra* at 6, in 1994 the Fund's trustees responded to a peak in demand for construction labor in central Illinois by amending the Plan to provide that participants receiving a Service-Only Pension would not have their benefit payments suspended unless they worked 40 hours or more in a month in disqualifying employment; before that amendment, any number of hours of such employment triggered a suspension. See J.A. 43 (Plan § 6.7(a)(2)).

Conversely, at the point that job markets shift and become tight such that jobs are scarce, plans tighten the rules for permitted re-employment of retirees (who could otherwise accept lower wages because they are receiving pension benefits) to limit the extent to which they compete against other non-retired plan participants for jobs. Thus, a principal purpose of Section 203(a)(3)(B) is to authorize pension plans, in times of tight job markets, "to protect participants against their pension plan being used, in effect, to subsidize low-wage employers who hire plan retirees to compete with, and undercut the wages and working conditions of[,] employees covered by the plan." 3 ERISA Legis. Hist. at 4738 (statement of Sen. Williams). See also 3 ERISA Legis. Hist. at 4772 (statement of Sen. Javits) (Congress intended to "protect unions against undercutting of wage scales and the

additional expense generated by the need to subsidize retirement benefits for those who have left the work force as well as retirement benefits for those continuing to work."); *Atkinson* v. *Sheet Metal Workers' Trust Funds*, 833 F.2d 864, 865 (CA9 1987) (Section 203(a)(3)(B) "protects the trust by preventing individuals from collecting pensions while they compete with those who are contributing to the fund"); *Riley* v. *MEBA Pension Trust*, 570 F.2d 406, 410 (CA2 1977).

The distribution of benefit payments also bears a direct relationship to a pension fund's financial health, which can vary considerably depending on both local and national economic conditions. In good times, the plan can afford to be more generous in paying retirement benefits. But in times of stringency, the suspension of benefit payments to retirees who are presently earning separate incomes from post-retirement employment is a valuable means of preserving the fund's assets. "The suspension of benefits to a retiree is a common device to maximize the assets of a pension fund by limiting such payments to those who are fully retired." *Bayles* v. *Cent. States, S.E. & S.W. Area Pension Fund*, 462 F. Supp. 102, 107 (N.D. Miss. 1978). See also *Pete* v. *United Mine Workers of Am.*, No. 1953-69, 1976 U.S. Dist. LEXIS 15,998, at *6 (D.D.C. 1976) ("By denying benefits to class members who have found post-denial employment, the Trustees in effect recognize that the Fund resources can better be used to benefit other eligible pensioners without employment."). "Because suspensions do not decrease accrued benefits, ERISA allows plan administrators more flexibility in adjusting the provisions for suspensions to maintain the financial integrity of pension plans." Pet. App. 28a n.2 (Cudahy, J., dissenting) (internal citation omitted). In harder economic times, Section 203(a)(3)(B) not only furthers the interests of all participants by ensuring that the fund's assets can be directed principally to retirees who are not receiving additional incomes, it also "protect[s] the fiscal integrity of the fund" "by preventing eligible employees from accepting a pension and going to work in the same occupation in the area

covered by the plan." *Dennis* v. *Bd. of Trustees*, 620 F. Supp. 572, 575 (M.D. Pa. 1985).

In circumstances like these, involving "conflicting obligations of the trustees to preserve the financial security of a pension fund and yet apply the assets to the greatest possible advantage for the beneficiaries," Congress recognized that "restricting the amounts paid to some may be necessary to prevent loss to others." *Geib* v. *N.Y. State Teamsters Conference Pension & Ret. Fund*, 758 F.2d 973, 978 (CA3 1985). Indeed, suspending the benefit payments of such retirees makes it unnecessary to secure excess funding that will otherwise "have to come largely from the stepped-up contributions of current participants." *Harm* v. *Bay Area Pipe Trades Pension Plan Trust Fund*, 701 F.2d 1301, 1305 (CA9 1983). Cf. *NLRB* v. *Amax Coal Co.*, 453 U.S. 322, 338 n.22 (1981) (among declared policy considerations of ERISA, in general, and the Multiemployer Pension Plan Amendments Act of 1980, in particular, is the "financial stability of multiemployer pension plans").

If the Seventh Circuit is correct that ERISA permits plans to suspend only "the portion of the benefit payment attributable to service after the amendment" (Pet. App. 10a n.6), the authority that Section 203(a)(3)(B) confers on plans to adjust to the current state of labor markets and present economic conditions would be rendered essentially nugatory. By definition, a plan can alter the incentives of a participant to *return* to the workforce only if that participant has already accrued retirement benefits and retired. Similarly, trustees cannot employ the tool of employment disqualification to adjust financial outlays to account for a plan's current financial health if the terms of any plan amendment apply only to benefits that accrue later and thus will not be paid until well in the future.

As a result, although invalidation of the Suspension Provision would benefit respondents personally, the great majority of participants in this and other plans would

inevitably be disadvantaged by the rule that respondents advocate. The participants harmed as a result would moreover be those who, unlike respondents, do not have the security of a post-retirement salary. When employment is hard to find, fewer jobs would be available to those non-retired workers. Trustees prohibited from adopting effective disqualifying employment provisions that apply to all benefits would also have to find other means of protecting the plan's assets. In petitioner's experience, trustees would respond by reducing costs, including by reducing future benefit accrual rates for active participants or reducing or eliminating benefit enhancements that would otherwise counteract cost of living increases for retirees. At the very least, if trustees are forbidden from adapting disqualifying employment provisions to changing circumstances, they would have no prudent choice but to adopt the strictest rule permitted by law from the outset in order to protect the plan's assets and to serve the interests of retirees who are dependent on their benefit payments. It is exceedingly unlikely that Congress intended to force that result.

II. The Court of Appeals Erred In Extending Section 204(g)'s Prohibition On Plan Amendments That "Decrease" Participants' "Benefits" To Forbid The "Suspension" Of "Benefit Payments" Expressly Authorized By Section 203(a)(3)(B).

The anti-cutback rule of ERISA Section 204(g) prohibits a plan amendment that "decrease[s]" previously accrued benefits, including if the amendment "has the effect" of "reducing an early retirement benefit." 29 U.S.C. 1054(g). Just as the ERISA regulatory authorities have concluded that Section 203(a)(3)(B) authorizes a plan to adopt an amended employment disqualification provision that suspends the payment of *all* benefits – including those accrued prior to the provision's adoption – so too the ERISA authorities have specifically determined that such a provision does not violate the anti-cutback rule. The view of the government is that

"[w]hile the anti-cutback rule of Section 204(g) expressly prohibits a decrease of an accrued benefit, it does not purport to prohibit a suspension of benefit payments that is authorized under other provisions of the statute. In particular, the anti-cutback rule does not prohibit the suspension of the payment of retirement benefits authorized by Section 203(a) of ERISA." U.S. Cert. *Amicus* Br. 8.

Consistent with the regulations issued by both the Secretary of Labor and the Secretary of the Treasury under Section 203(a)(3)(B) (see *supra* at 17-18), the IRS regulations thus provide that a plan's suspension of benefit payments pursuant to Section 203(a)(3)(B) does not decrease a participant's "accrued benefits" for purposes of ERISA's anti-cutback rule. See 26 C.F.R. 1.411(c)-1(f) ("No adjustment to an accrued benefit is required on account of any suspension of benefits if such suspension is permitted under section 203(a)(3)(B)."). The governing IRS Manual accordingly states in definite terms: "An amendment that reduces IRC 411(d)(6) protected benefits on account of 203(a)(3)(B) service does not violate IRC 411(d)(6)." IRS Multiemployer Plan Examination Guidelines § 4.72.14.3.5.3(7) (May 4, 2001).[7] This interpretation is entitled to deference, and it is clearly a permissible reading, to say the least, of the ERISA provisions. See *Alaska Dep't of Env'tl Conserv.* v. *EPA*, __ U.S. __, No. 02-658 (Jan. 21, 2004) (holding that "cogent administrative interpretations" not meeting the formal criteria

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[7] The Seventh Circuit mistakenly thought its position was consistent with a different IRS regulation, 26 C.F.R. 1.411(d)-4, which in "Q&A-7" states that a plan amendment violates the anti-cutback rule if it adds a new "condition" to a "protected" benefit. As the United States has explained, that regulation does not apply in this circumstance, for the IRS distinguishes payments that are suspended under Section 203(a) from a "protected benefit." U.S. Cert. *Amicus* Br. 13. In any event, the regulation does not purport to apply to conditions that Congress expressly authorized in ERISA Section 203(a).

for *Chevron* deference nonetheless "warrant respect" and that "particular deference" is owed to "an agency interpretation of longstanding duration," and then assessing whether such an interpretation contained in an internal agency memorandum must be "reject[ed] as impermissible").

That conclusion is sound, and the contrary reading of respondents and the Seventh Circuit should be rejected.

1. There is first of all the matter of Section 204(g)'s literal language. On its face, that provision of ERISA regulates amendments that decrease benefits, terminology that (as neither respondents nor the Seventh Circuit dispute) refers to amendments that modify the defined periodic benefit the plan is legally obliged to pay. All would thus agree that petitioner could not adopt a plan amendment that changed respondents' benefits (which had already accrued at the time the Suspension Provision was adopted) from, for example, $1650 to $1450 per month.

But such a prohibited amendment stands in contradistinction to one that merely provides for the temporary suspension of the payment of benefits. Nothing in Section 204(g) states an anti-cutback rule prohibiting plan amendments providing for such a suspension. Section 204(g) is triggered by "a reduction or elimination of accrued benefits and retirement-type subsidies, not a suspension, as is the case here." *Whisman* v. *Robbins*, 55 F.3d 1140, 1147 (CA6 1995). Although respondents' benefit payments are presently "suspended" because they have elected to engage in disqualifying employment, their defined "benefit" of approximately $1650 a month remains the same: when they elect to leave disqualifying employment, the suspension will end and their benefits will be paid at the level defined by the Plan and paid prior to the period of suspension.

This Court has repeatedly recognized that, because "ERISA is a 'comprehensive and reticulated statute,' and is 'enormously complex and detailed,' it should not be supplemented by extratextual" inferences of congressional

intent. *Hughes Aircraft Co.* v. *Jacobsen*, 525 U.S. 432, 447 (1999) (quoting *Nachman Corp.* v. *Pension Benefit Guaranty Corp.*, 446 U.S. 339, 361 (1980); *Mertens* v. *Hewitt Assoc.*, 508 U.S. 248, 262 (1993)). In the context of this case, that settled principle compels the conclusion that Congress, in prohibiting a plan amendment that "decreases" benefits, did not impliedly intend to limit the authority it had separately conferred in Section 203(a)(3)(B) to adopt provisions relating to the "suspension" of benefits during periods of disqualifying employment.[8]

2. The majority below did "not view the omission of a specific reference to suspensions in the anti-cutback rule as an oversight, but as unnecessary." Pet. App. 15a. In reality, if Congress had intended to render participants' benefits not merely *protected* by the limitations on suspension set by Section 203(a)(3)(B) but *inviolate*, it could have done so explicitly in several ways. It could have prohibited in Section 203(a)(3)(B) the adoption of employment disqualification provisions that apply to previously accrued benefits. Alternatively, Congress could have provided that the anti-cutback rule of Section 204(g) applies not merely to

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[8] See, *e.g.*, *Inter-Modal Rail Employees Ass'n* v. *Atchison, Topeka & Santa Fe Ry.*, 520 U.S. 510, 515 (1997) ("Had Congress intended to confine [ERISA] § 510's protection to 'vested' rights, it could have easily substituted the term 'pension plan,' for 'plan,' or the term 'nonforfeitable' right, for 'any right.'" (internal citations omitted)); *Lockheed Corp.* v. *Spink*, 517 U.S. 882, 892-93 (1996) ("[ERISA] Section 406(a)(1)(D) does not in direct terms include the payment of benefits by a plan administrator. And the surrounding provisions suggest that the payment of benefits is in fact not a 'transaction' in the sense that Congress used that term in § 406(a)."); *Fort Halifax Packing Co.* v. *Coyne*, 482 U.S. 1, 8 (1987) ("The words 'benefit' and 'plan' are used separately throughout ERISA, and nowhere in the statute are they treated as the equivalent of one another. Given the basic difference between a 'benefit' and a 'plan,' Congress' choice of language is significant in its pre-emption of only the latter.").

amendments that decrease benefits but also those that "suspend benefit payments."

The view of the ERISA regulatory authorities thus corresponds to the terms of art that Congress used in Section 204(g). "There is no doubt that the drafters knew how to include the concept of suspension, in contrast to that of reduction, when they wanted to do so." Pet. App. 24a (Cudahy, J., dissenting). "Throughout the statute and corresponding regulations, the concepts of reduction of benefits and suspension of benefit payments are used in distinct ways, often within a single provision." *Spacek* v. *Maritime Ass'n. ILA Pension Plan*, 134 F.3d 283, 288 (CA5 1998). "[U]nder the plain language of the statute, a suspension of benefit payments is not a reduction of benefits * * *." *Id.* at 289.

Section 203(a)(3) itself is the most telling illustration of this point. As discussed above, under that provision, benefits are not impermissibly "forfeitable" if payments are "suspended" in the event the participant chooses to engage in disqualifying employment. § 203(a)(3)(B), 29 U.S.C. 1053(a)(3)(B). But Section 203 also states that benefits are not forfeitable if, pursuant to provisions governing financially distressed and terminated multiemployer plans, "the plan is amended to reduce benefits" (§ 203(a)(3)(E)(ii)(I), 29 U.S.C. 1053(a)(3)(E)(ii)(I)) or, in other circumstances, "benefit payments" are "suspended" (§ 203(a)(3)(E)(ii)(II), 29 U.S.C. 1053(a)(3)(E)(ii)(II)). Section 203(a) also provides that benefits are not "forfeitable" to the extent a plan amendment adopted pursuant to Section 302(c)(8) "reduces the accrued benefit of [a] participant." § 203(a)(3)(C), 29 U.S.C. 1053(a)(3)(C) (incorporating § 302(c)(8), 29 U.S.C. 1082(c)(8)). And the closely related provisions of Title IV of ERISA define "nonforfeitable benefit" as "a benefit for which a participant has satisfied the conditions for entitlement * * *, whether or not the benefit may subsequently be reduced or suspended by a plan amendment." 29 U.S.C. 1301(a)(8).

The provision on which respondents rely, Section 204(g), states that the "accrued benefit of a participant under a plan may not be decreased by an amendment." § 204(g)(1), 29 U.S.C. 1054(g)(1). But Section 204 also addresses the distinct circumstance in which benefits are "suspended" as a result of disqualifying employment. In the case of a participant in a defined benefit plan who has reached normal retirement age but has not started receiving benefits, the plan shall make an "adjustment in the benefit payable * * * attributable to the delay in the distribution of benefits after the attainment of normal retirement age," unless "the payment of benefits [has been] suspended * * * pursuant to section 203(a)(3)(B)." § 204(b)(1)(H)(iii)(II), 29 U.S.C. 1054(b)(1)(H)(iii)(II).

The same clear distinction in Congress's use of the terms "reduction" and "suspension" exists in the provisions of ERISA regarding financial distress that both Section 203(a)(3) and Section 204(g) incorporate. For example, when the benefits owed by a terminated plan exceed its assets, "the plan sponsor shall amend the plan to reduce benefits under the plan to the extent necessary to ensure that the plan's assets are sufficient." § 4281(c)(1), 29 U.S.C. 1441(c)(1). But if the plan remains "insolvent" despite the fact that "the plan has been amended to reduce benefits," then "payments which are not basic benefits shall be suspended." § 4281(d), 29 U.S.C. 1441(d). Those same provisions also require a plan to "reduce benefits" or (if that fails to restore the plan to financial health) to "suspend benefit payments" when a plan becomes "nonoperative" and "terminates" under certain circumstances. § 4041A(d), 29 U.S.C. 1341a(d). And a trustee of a terminated multiemployer plan has the power "to reduce benefits or suspend benefit payments under the plan." § 4042(d)(1)(A)(v), 29 U.S.C. 1342(d)(1)(A)(v).

3. The statutory structure similarly confirms the view of the ERISA regulatory authorities that the anti-cutback rule does not limit the authority conferred by Section 203(a)(3)(B) to adopt plan provisions relating to disqualifying

employment. The purpose of the accrual rules set forth in Section 204 is to prevent employers from avoiding the vesting requirements of Section 203. For example, the provision of Section 203(a) specifying that a participant's benefits must vest at a certain annual percentage, see 29 U.S.C. 1053(a)(2), is reinforced by, for example, the requirement of Section 204, 29 U.S.C. 1054, that the participant's benefits must accrue at a certain rate (ensuring that they are not "backloaded" to later periods of the participant's employment). The same is true of the anti-cutback rule, which prevents plans from reducing benefits before they vest under Section 203.

It is thus uniformly acknowledged that "Congress adopted § 1054 [§ 204] because it was concerned that without fair and equitable procedures for computing accrued pension benefits, employers could easily circumvent the requirements of minimum vesting which are essential to the Act." *Dameron* v. *Sinai Hosp. of Balt.*, 815 F.2d 975, 979 (CA4 1987). Section 204 "should be read together with section 203 to protect the employee against efforts to circumvent section 203's vesting rules." *Jones* v. *UOP*, 16 F.3d 141, 144 (CA7 1994) (Posner, then-C.J.).

The governing regulations recognize that extending the anti-cutback rule to protect a right to benefit payments that does *not* vest under Section 203(a) would not further Congress's purpose in enacting Section 204. In Section 203(a)(3)(B), Congress specifically tempered the vesting standards by authorizing plans to provide for the suspension of benefits during disqualifying employment. From the fact that Congress designed the statutory vesting rules to authorize such suspension, it follows that Congress did not intend that the anti-circumvention provisions of Section 204 would limit that very authority.[9]

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[9] Nor does the suspension of benefit payments pursuant to Section 203(a)(3)(B) otherwise vindicate an interest, which might be deemed implicit in Section 204(g), in protecting participants' benefits from unilateral reduction by plans. Employment disqualification arises only when the participant *himself* decides to *leave* retirement and to secure a further income.

4. The drafting history and legislative history confirm that Congress crafted Section 204(g) so as not to limit plans' authority under Section 203(a)(3)(B) to adopt employment disqualification amendments that apply to previously accrued benefits. The provisions of ERISA that became Sections 203(a)(3)(B) and 204(g) were added simultaneously in February 1974 in Section 203 of the House bill. See 2 ERISA Legis. Hist. at 2772, 2836, 2841 (H.R. 12906, §§ 3(19), 203(a), 203(f)(1)).[10] The bill also provided that "a right to an accrued benefit derived from employer contributions shall not be treated as forfeitable merely because the plan provides that * * * the *payment of benefits is suspended* during periods when the participant has resumed employment with the employer (or, in the case of a multiemployer plan, has resumed employment in the industry before normal retirement age)." *Id.* at 2772 (§ 3(19) (emphasis added), *incorporated by* § 203(a)). By contrast, the bill provided that "a plan may not be amended in a manner which *reduces benefits* which accrued before the plan year preceding the plan year in which the amendment is adopted." *Id.* at 2841 (§ 203(f)) (emphasis added). The distinction between the suspension of benefit payments and the reduction of benefits remained consistent through ERISA's final enactment.[11]

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[10] Earlier versions of the bill did not include either provision. See 1 ERISA Legis. Hist. at 10 & 51 (H.R. 2, §§ 3(20) & 203), 75 (H.R. 462, § 3(26)), 103 & 116 (S. 4, §§ 3(26) & 201-202), 235 (S. 1179, § 322), 328 (S. 1631, § 12(a)), 494 & 509 (S. 4, §§ 3(26) & 202), 695 & 745 (H.R. 9824, § 3(19) & 203(a)), 837 (S. 1179, § 221(a)), 1288-89 (S. 4, § 221(a)); 2 ERISA Legis. Hist. at 1901 (H.R. 4200, § 221(a)), 2251-52 & 2304 (H.R. 2, §§ 3(19) & 203(a)).

[11] Compare *Milwaukee Brewery Workers' Pension Plan* v. *Jos. Schlitz Brewing Co.*, 513 U.S. 414, 430 (1995) (determining date that interest runs on multiemployer plan's withdrawal liability in

The legislative history of the 1984 amendment specifying that Section 204(g) applies to early retirement benefits similarly confirms that Congress did not thereby intend to impose some further limitation on plans' express authority under Section 203(a)(3)(B) to adopt plan provisions under which benefit payments are suspended during periods of disqualifying employment. The same 1984 amendment that added Section 204(g)(2) also modified Section 203, but notably left Section 203(a)(3)(B) untouched.

The principal sponsor of the 1984 amendment, Representative William Clay, moreover addressed the very question presented by this case. He explained at the time that Section 204(g) does not "*in any way* apply to or affect the provisions of ERISA section 203(a)(3)(B) * * * relating to the suspension of benefits for postretirement employment, including the authorization for multiemployer plans to adopt stricter rules for the suspension of subsidized early retirement benefits." 130 Cong. Rec. 23,487 (1984) (emphasis added).

Representative Clay's remarks are confirmed by the reports accompanying the bill. The Senate Report specifies that the amendment merely "clarifies the scope of the prohibition against [benefit] decreases," and thus "does not affect the application of any other provision of the Code." S. Rep. No. 98-575, 98th Cong., 2d Sess. 28 (1984). In particular, the amendment "does not change any rules under which accrued benefits become vested." *Ibid.* The "vesting" of benefits is governed by the forfeitability provisions of Section 203(a), including Section 203(a)(3)(B). See *Nachman Corp.* v. *PBGC*, 446 U.S. 359, 376 (1980) (stating that in ERISA, "the terms 'vested' and 'nonforfeitable' were used synonymously" (citing § 3(25), 29 U.S.C. 1002(25)

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part based on the fact that "throughout the bill's history, the valuation date and interest-accrual date moved about in an apparently uncoordinated way. This somewhat undermines the Plan's suggestion that Congress was very concerned about the interplay between the two.").

("'vested liabilities' means the present value of the immediate or deferred benefits available at normal retirement age for participants and their beneficiaries which are nonforfeitable"))). And the House Report similarly confirms that Congress did not intend to overturn the government's consistent practice of approving plan amendments that expand the definition of disqualifying employment. It explains that Section 204(g)(2) "codifies present law generally precluding the elimination or reduction of benefits that have already been accrued by employees." H.R. Rep. No. 98-655, 98th Cong., 2d Sess. 25-26 (1984). Cf. *Alessi* v. *Raybestos-Manhattan, Inc.*, 451 U.S. 504, 519 (1981) ("[W]hen it enacted ERISA, Congress knew of the IRS rulings permitting integration and left them in effect.'").

5. Against all this, the Seventh Circuit based its conclusion that a plan provision providing for the suspension of the payment of benefits that have previously accrued violates Section 204(g) on the theory that the anti-cutback rule forbids the addition of any material "condition" on a participant's benefits (Pet. App. 9a, 15a), and that by extending the scope of disqualifying employment the Suspension Provision placed an additional condition on respondents' "right" post-retirement "to work as construction supervisors and continue to receive their monthly benefit payments" (*id.* 8a).[12]

The fatal flaw in the Seventh Circuit's reasoning is that the "right" conjured by the court of appeals is not a "benefit" protected by ERISA and, *ipso facto*, is not a "benefit" that the Suspension Provision can be said to have decreased in violation of Section 204(g). A benefit is defined by the plan document, generally as a stream of payments. See *Alessi*, 451

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[12] The breadth of the court of appeals' holding is startling. On the Seventh Circuit's view, every employment disqualification provision not limited merely to benefits that are earned in the future violates the anti-cutback rule with respect to *every* participant, whether retired or not, who has previously accrued benefits.

U.S. at 514. The plan in this case, like the other plans with which petitioner is familiar, provides no assurance and no right that the participant will secure post-retirement employment. And any interference by the Plan in respondents' efforts to secure such employment is not actionable under ERISA.

Beyond this, it is a second complete answer to the Seventh Circuit's reasoning that Congress expressly authorized the "condition" at issue in this case. The very point of the forfeitability rules of ERISA Section 203(a) is to identify the circumstances in which a benefit must be "unconditional." § 203(a), 29 U.S.C. 1053(a), *incorporating* § 3(19), 29 U.S.C. 1002(19). A suspension of benefits provision authorized by Section 203(a)(3)(B) is, by its very nature, a condition on accrued benefits that Congress concluded was lawful.[13]

Finally, the Seventh Circuit erred in attributing significance to the fact that the suspension of benefit payments for disqualifying employment results in a loss of pension income forever. See Pet. App. 10a. Congress approved that result in the carefully defined circumstances set forth in Section 203(a)(3)(B). As the regulations explain, in the event of suspension, "[a] plan may provide for the permanent withholding" of benefit payments. 29 C.F.R. 2530.203-3(b)(1). That result is "acceptable if they withdraw

[13] Indeed, because the Suspension Provision is specifically contemplated by Section 203(a)(3)(B) and its implementing regulations, this case does not present the question whether Section 204(g) prohibits a pension plan amendment that adds a material condition on previously accrued "benefits" as opposed to "benefit payments." As discussed in the text, the distinction between those terms is well established in ERISA. This case can accordingly be resolved on the narrow ground that Congress specifically authorized plans to adopt conditions on the receipt of benefit payments by participants who elect to engage in disqualifying employment.

from retirement and return to the workforce, later to place additional demands upon the plan. They suffer no loss of regular income and are merely deprived of a bonus in the form of a dual recovery at the expense of the construction industry. Meanwhile, the financial integrity of the plan may be affected by continuing to make retirement provisions for participants who have not really retired." Pet. App. 31a (Cudahy, J., dissenting).

CONCLUSION

For the foregoing reasons, the judgment of the Seventh Circuit should be reversed.

Respectfully submitted,

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